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**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Cause No.: DA 09-0510

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STATE OF MONTANA, *ex rel.*  
DEPARTMENT OF ENVIRONMENTAL QUALITY,

PLAINTIFF/APPELLANT and CROSS-APPELLEE

v.

BNSF RAILWAY COMPANY,

DEFENDANT/APPELLEE and CROSS-APPELLANT

**FILED**

MAY 18 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**AFFIDAVIT IN SUPPORT OF MOTION FOR PERMISSION  
TO EXCEED WORD LIMITATION  
IN APPELLANT'S COMBINED REPLY BRIEF/  
CROSS-APPEAL ANSWER BRIEF**

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Appearances:

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On Appeal from the First Judicial District Court, Lewis and Clark County  
The Honorable Jeffrey M. Sherlock, Presiding  
District Court Cause No. BDV 2004-596

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STATE OF MONTANA            )  
  : ss.  
County of Lewis & Clark        )

R. ALLAN PAYNE, of Helena, Montana, being first duly sworn,  
deposes and states:

1.     Affiant is an attorney with Doney Crowley Bloomquist Payne  
Uda P.C., which represents the Appellant State of Montana *ex rel.*  
Department of Environmental Quality (“DEQ”) in the above-captioned  
matter, and has personal knowledge of the matters herein.

2.     On or about May 17, 2010, Appellee/Cross-Appellant BNSF  
Railway Company filed a Combined Answer and Cross-Appeal Brief.

3.     The 5,000 word limit for DEQ’s Combined Reply Brief/Cross-  
Appeal Answer Brief, set forth in M. R. App. P. 12(4) and 11(4)(a), is  
insufficient given the circumstances of this case.

4.     This Appeal is the first time the Montana Supreme Court will  
fully interpret numerous provisions of Montana’s Comprehensive  
Environmental Cleanup and Responsibility Act, Mont. Code Ann. §§ 75-10-  
701, *et seq.* (“CECRA”). Most importantly, this Court will clarify the scope  
of DEQ’s authority under CECRA to set environmental standards for toxic  
waste cleanups, and the meaning and reach of CECRA’s joint and several

liability scheme. The Appeal also raises constitutional issues and tort issues of first impression with this Court.

5. These legal issues are of seminal importance to State regulators, property owners (including potentially liable parties), and the citizens of Montana whose health, safety, and well-being depends on DEQ's management and cleanup of toxic waste sites.

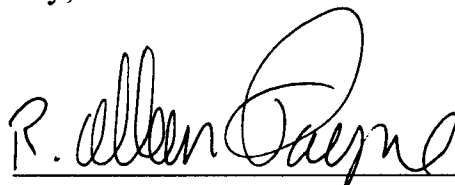
6. Based on the importance of the legal issues for this Court and all Montanans, DEQ cannot fully and fairly reply to and answer BNSF's Response and Cross-Appeal within 5,000 words.

7. Further, the 5,000 word limit is insufficient for a combined Reply and Cross-Appeal Answer Brief. While an Answer Brief is generally considered a "principal" brief and allowed 10,000 words and a Reply brief is allowed 5,000 words (M. R. App. P. 11(4)(a)), a brief *combining* an Answer to a Cross Appeal and a Reply to Appellee's Brief is limited to 5,000 words. M. R. App. P. 12(10). In this situation, DEQ is, therefore, required to do twice the work in half the space.

8. Given the number and extraordinary weight of the legal issues before this Court, Affiant believes it is just and reasonable to increase

DEQ's Combined Reply Brief/Cross-Appeal Answer Brief word limit from  
5,000 to 7,500 words.

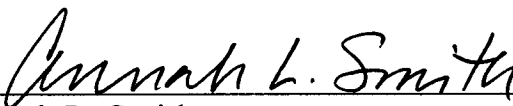
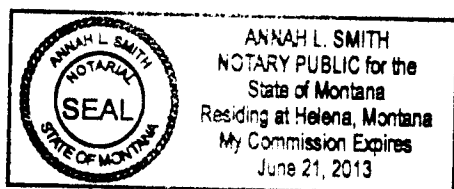
DATED this 18<sup>th</sup> day of May, 2010.



R. Allan Payne

SUBSCRIBED AND SWORN TO before me, the undersigned, by R.

ALLAN PAYNE, this 18<sup>th</sup> day of May, 2010.



Annah L. Smith

Notary Public for the State of Montana

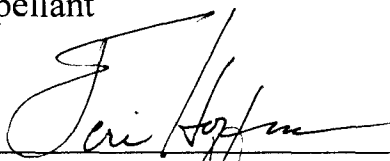
## CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of May, 2010, a true and correct copy of the foregoing ***AFFIDAVIT IN SUPPORT OF MOTION FOR PERMISSION TO EXCEED WORD LIMITATION IN APPELLANT'S COMBINED REPLY BRIEF/CROSS-APPEAL ANSWER BRIEF*** was duly served via First Class U.S. Mail, postage prepaid, on the attorneys of record addressed as follows:

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Jeri L. Hoffman, ACP